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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	:	
In Re: Approval Order – PSD Major Modification to Add New Unit 3 at Intermountain Power Generating Station, Millard County, Utah Project Code: N0327-010 DAQE-AN0327010-04	:	CONSOLIDATED OPPOSITION TO MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Utah Chapter of the Sierra Club (Sierra Club) respectfully submits the following Consolidated Opposition to the Motions for Judgment on the Pleadings filed in these two matters by the Executive Secretary of the Utah Air Quality Board (Executive Secretary), Sevier Power Company (SPC), PacifiCorp, and Intermountain Power Service Corporation (IPSC), together with supporting exhibits. As described below, the Executive Secretary, SPC, PacifiCorp, and IPSC (collectively referred to as the "Proponents" because they support the Division of Air Quality (DAQ)'s position) raise

identical issues in their five briefs, and Sierra Club submits this single Consolidated Opposition addressing the five briefs[1] for the convenience of the Board and the parties.

Introduction

Proponents have described much of the procedural background of this matter in their motions, and Sierra Club will not repeat this history except to address factual or legal inaccuracies. Proponents have submitted motions for judgment on the pleadings regarding three claims in Sierra Club's Requests for Agency Action[2] challenging the Approval Orders (AOs) that DAQ issued to IPSC and SPC. In each of their briefs, Proponents challenge two of Sierra Club's claims which are common to both matters: that (1) DAQ is required to consider adequately the Integrated Gasification Combined Cycle (IGCC) production process for generating electricity from coal as part of its "best available control technology" (BACT) analysis for each plant,[3] and (2) that DAQ is

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[1] This Consolidated Opposition refers to the five briefs as:

- "DAQ MJP Brief in SPC" (Executive Secretary's Motion for Judgment on the Pleadings in the Matter of Sevier Power Company Power Plant, DAQE-AN2529001-04);
- "SPC MJP Brief" (Sevier Power Company's Memorandum in Support of Motion for Partial Judgment on the Pleadings);
- "PacifiCorp MJP Brief" (PacifiCorp's Motion for Judgment on the Pleadings);
- "DAQ MJP Brief in IPSC" (Executive Secretary's Motion for Judgment on the Pleadings in the Matter of Unit 3, Intermountain Power Service, DAQE-AN327010-04);
- "IPSC MJP Brief" (Memorandum in Support of IPSC's Motion for Partial Judgment on the Pleadings: Appeal Issues 1, 3, & 5).

[2] For purposes of this Consolidated Opposition, and to make citation easier, "Requests for Agency Action" refers to the Request for Agency Action dated November 12, 2004, submitted in the SPC matter and the First Amended Request for Agency Action dated November 15, 2006 submitted in the IPSC matter. The Proponents' motions for judgment on the pleadings do not concern Sierra Club's pending motions to further amend its pleadings.

[3] Sierra Club IPSC First Amended Request For Agency Action, Statement of Reasons # 1, Sierra Club SPC Request for Agency Action, Statement of Reasons # 2. Exhibit 1, AR IPSC 4494-95, SPC RFA p. 4. The relevant parts of Sierra Club's Requests for Agency

required to address carbon dioxide (CO_2), nitrous oxide (N_2O), and other greenhouse gas emissions during the permitting process, including its BACT analysis.[4] Although Proponents offer different rationales for their motions, all the motions are for a judgment on the pleadings, and the briefs are sufficiently common that Sierra Club can respond to them in a single, consolidated opposition. Because the Executive Secretary is the principal respondent in both matters, this Consolidated Opposition primarily focuses on Executive Secretary's arguments, and addresses the other Proponents' arguments as appropriate and necessary.[5]

The Board should deny Proponents' motions for judgment on the pleadings because Sierra Club's pleadings sufficiently state claims on which the Board could grant relief. Motions for judgment on the pleadings, offered early in the proceedings, address only the sufficiency of Sierra Club's pleadings. "Pleadings" is a term in the Utah Rules of Civil Procedure that, in a court case, means the complaint and the answer[6] – in these administrative proceedings, "pleadings" corresponds to Sierra Club's Requests for

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Action are attached as Exhibit 1, and materials incorporated by reference in those sections are provided on the enclosed CD-Rom.

[4] Sierra Club IPSC First Amended Request For Agency Action, Statement of Reasons # 3, Sierra Club SPC Request for Agency Action, Statement of Reasons # 1. Exhibit 1, AR IPSC 4496-97, SPC RFA pp. 3-4.

[5] IPSC alone has filed a motion for judgment on the pleadings regarding a separate issue – Sierra Club's claim that DAQ erroneously issued the permit for Unit 3 without adequate coal chemistry data. Exhibit 1, AR IPSC 4498. That issue is also addressed in this Consolidated Opposition.

[6] Utah R. Civ. P. 7(a) ("Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.")

Agency Action in each matter, including the documents incorporated in them by reference, along with the responses to the Requests for Agency Action.

This means that the Board reviews only Sierra Club's Requests for Agency Action to decide whether Sierra Club has adequately alleged claims on which relief could be granted. A motion for judgment on the pleadings does not address the ultimate merits of those claims. As will be clear from the applicable legal standards for deciding a motion for judgment on the pleadings, discussed below, the Board must accept as true all the facts that Sierra Club alleges for purposes of these preliminary motions.

Sierra Club regrets that a significant part of this brief is devoted to describing the correct legal standards and procedure the Board must follow in deciding these motions. This is due, in part, to the fact that the standards for deciding motions made at different points throughout the course of a case vary according to how much evidence has been developed up to that point, and, in particular, whether there has been a hearing. It is also due, in part, to the need to describe fully the legal standards which apply to these motions for judgment on the pleadings, which are not described in sufficient detail in Proponents' briefs.

In addition, despite the fact these are motions "on the pleadings," none of the Proponents has actually attached Sierra Club's pleadings to their motions or briefs. It means that the Board has had to review Proponents' briefs without the benefit of having the actual pleadings before it, and has required this Consolidated Opposition to be longer than it might otherwise have needed to be. In addition, as described below at pages 41-44, Proponents have introduced procedural confusion by presenting "motions for

judgment on the pleadings" and attaching materials that are not part of the pleadings, necessitating a response and clarification from Sierra Club.

To decide a motion for judgment on the pleadings, the Board must take all of Sierra Club's factual allegations in its Requests for Agency Action (RFA) as true. At this stage, the Board cannot weigh competing arguments regarding the facts – rather, the Board has to take Sierra Club's facts as true, and may only grant the motions if the Board determines that there is no set of facts that Sierra Club could prove to support its claim. When the Board accepts the facts in Sierra Club's pleadings as true, and analyzes them in conjunction with the applicable law, the Board must deny the motions for judgment on the pleadings because it is clear that Sierra Club has sufficiently alleged its claims.

I. The Board Must Apply the Correct Legal Standards for Deciding Motions for Judgment on the Pleadings.

A. In Ruling on the Motions for Judgment on the Pleadings, the Board Must Accept Sierra Club's Factual Allegations as True.

None of the Proponents correctly describes the legal standards the Board must apply in deciding whether to grant or deny the motions for judgment on the pleadings. In addition, they do not cite the principal Utah cases addressing motions for judgment on the pleadings. The Executive Secretary comes closest, providing the language of Utah Rule of Civil Procedure 12(c), which covers motions for judgment on the pleadings: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."[7] The Executive Secretary is also correct that "a grant of a motion for judgment on the pleadings is reviewed under the same standard as the grant

[7] Utah R. Civ. P. 12(c).

of a motion to dismiss."[8] However, the most important standard the Board must apply in deciding a motion for judgment on the pleadings is missing from all of Proponents' briefs: this is that, in deciding a motion for judgment on the pleadings, the Board must assume the truth of the allegations in Sierra Club's Requests for Agency Action, including the documents which those Requests incorporate by reference.[9]

The Utah Supreme Court has stated that "dismissal[10] is a severe measure and should be granted by the [Board] only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim."[11] Furthermore, when deciding a motion for judgment on the pleadings, the Court has made clear that the only "issue before the [Board] is whether the petitioner has alleged enough in the complaint to state a cause of action,"[12] and that a motion for judgment on the pleadings "concerns the sufficiency of the pleadings, not the underlying merits of a particular case."[13] In deciding these motions, the Board will "look solely to the material allegations of [the plaintiff's] complaint."[14]

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[8] Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 898 (Utah 1990); see DAQ MJP Brief in SPC at 2, DAQ MJP Brief in IPSC at 2.

[9] Golding, 793 P.2d at 898 ("in considering the factual allegations in the complaint, we take them as true and consider them and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff."); Colman v. Utah Land Bd., 795 P.2d 622, 624 (Utah 1990) (the court may "look solely to the material allegations of [the plaintiff's] complaint").

[10] The Supreme Court is discussing a motion to dismiss in this case. However, as the Executive Secretary points out, the courts will treat a motion for judgment on the pleadings in the same way as a motion to dismiss.

[11] Colman., 795 P.2d at 624 (emphasis added). In these proceedings, the Board is in the same position as a trial court because it is "vested with adjudicative functions," Utah Chapter of the Sierra Club v. Air Quality Bd., 2006 UT 74, ¶ 12, 148 P.3d 960, and thus "Board" replaces "trial court" in the description of the legal standards.

[12] Alvarez v. Galetka, 933 P.2d 987, 989 (Utah 1997) (emphasis added).

[13] Id.

[14] Colman, 795 P.2d at 624.

Most importantly, in deciding whether to grant or deny a motion on the pleadings, the Board must "take the factual allegations of the nonmoving party [Sierra Club] as true, considering such facts 'and all reasonable inferences drawn therefrom in a light most favorable to the [nonmoving party – Sierra Club].'"[15] The Board may grant the motions only "if, as a matter of law, the plaintiff could not recover under the facts alleged."[16]

Under the applicable Utah legal standards, a court (or, in this instance, the Board) should be reluctant to grant a motion for judgment on the pleadings because the Board is "a forum for settling controversies, and if there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof."[17] The Board should be aware that "judgments on the pleadings are 'not favored by the courts, and when made[,] great liberality in construing the assailed pleading should be allowed.'"[18]

One further point: Utah law is also clear that, when deciding the motions for judgment on the pleadings, the Board may only consider the materials in the pleadings, and no material outside of the pleadings.[19] The pleadings consist of "complaints and answers" allowed under Utah Rule of Civil Procedure 7(a).[20] Pleadings also include

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[15] Straley v. Halliday, 2000 UT App 38, ¶ 2, 997 P.2d 338) (quoting Golding, 793 P.2d at 898)
[16] Golding, 793 P.2d at 898.
[17] Colman, 795 P.2d at 624 (emphasis added); see also Celebrity Club, Inc. v. Utah Liquor Control Comm'n, 657 P.2d 1293, 1296 (Utah 1982) ("It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy." (footnote and quotations omitted)).
[18] MBNA America Bank, N.A. v. Williams, 2006 UT App 432, ¶ 2, 147 P.3d 536 (quoting Harman v. Yeager, 110 P.2d 352, 353 (Utah 1941)).
[19] Colman 795 P.2d at 624, Oakwood Village LLC v. Albertson's Inc., 2004 UT 101, ¶15, 104 P.3d 1226.
[20] Tuttle, 2007 UT App 10, ¶ 9.

materials incorporated by reference in the pleadings.[21] In this case, Sierra Club's Requests for Agency Action incorporate by reference four sets of comments Sierra Club submitted to the DAQ.[22] As a result, these comments are part of the pleadings for purposes of these motions.

Although motions for judgment on the pleadings must be based on the pleadings, it is rather odd that none of the Proponents have attached any of the pleadings to their briefs. To rectify this omission – and because Proponents have in places selectively quoted or inaccurately characterized Sierra Club's claims – Sierra Club attaches as Exhibit 1 the relevant sections of its Requests for Agency Action. In addition, because those relevant sections incorporate by reference the eight sets of comments (including supporting documents) that Sierra Club submitted to DAQ in 2003 and 2004, Sierra Club encloses a CD-Rom for the Board's review which contains those comments.[23] Because Sierra Club's pleadings thus amount to more than 2,000 pages of materials, Sierra Club

[21] Oakwood Village, 2004 UT 101, ¶ 13 (holding that material formally incorporated by reference in a complaint is a matter within the pleadings); see also id. ¶ 14-15 (holding that a declaration that was "central to and referenced in the complaint" was "material within the pleadings.").

[22] Sierra Club's Request for Agency Action in the IPSC matter expressly states that it (and the Grand Canyon Trust) "hereby incorporate and reference their comments dated April 14, 2003, May 20, 2004, June 30, 2004, and July 16, 2004, and the documents submitted in support of those comments." Exhibit 1, AR IPSC 4494. Similar language appears in the Request for Agency Action in the SPC matter. Exhibit 1, SPC RFA p. 3. In addition, the Sierra Club expressly noted that "The Sierra Club and Grand Canyon Trust have, in their May 20, 2004 comments on the ITA for the IPP project, detailed the basis for this and other statements regarding the need to evaluate IGCC as part of a proper BACT analysis for IPP. Because the organizations have already referenced and incorporated those comments into their Request for Agency Action, they will not repeat those detailed arguments here." Exhibit 1, AR IPSC 4494, footnote 3.

[23] These comments and supporting documents appear in the Administrative Records at AR IPSC 1377-1529, AR IPSC 2349-3356, AR IPSC 3547-3714, AR IPSC 3776-3872, and among the public comments in the compilation provided by the Executive Secretary numbered "AR SPC 1131."

will provide the Board with selected pages from among those pleadings in hard copy for its convenience in reading this brief, attached as Exhibit 2. However, because the comments on enclosed CD-Rom are an integral part of Sierra Club's pleadings, the Board should consider the facts described in them as true in deciding these motions for judgment on the pleadings.[24]

B. The "Burden of Proof" on a Motion for Judgment on the Pleadings Rests on the Moving Parties – the Executive Secretary, IPSC, SPC, and PacifiCorp.

The Executive Secretary has correctly advised the Board in its briefs that, on these motions, the burden is on the "moving party" or parties – that is, on the Executive Secretary, IPSC, SPC, and PacifiCorp – to "'clearly establish that no material issue of fact remains to be resolved and that [they are] entitled to judgment as a matter of law."[25] The Harken case that IPSC and PacifiCorp cite[26] involved a Board of Oil, Gas & Mining decision on the merits, after that Board received extensive testimony – not a motion for judgment on the pleadings.[27] Unlike in Harken, the burden rests on Proponents at this stage in the proceedings. Indeed, IPSC and PacifiCorp's incorrect statement of the applicable law on these motions would "prematurely shift[] the burden of proof to the plaintiff and in effect relieve[] the defendant[s] from [their] burden of proof."[28] Because the Utah Supreme Court has clearly laid out how the Board must evaluate the facts and

[24] In the event the Board grants the Proponents' motions, the comments on the enclosed CD-Rom will also constitute part of the record on appeal.
[25] DAQ MJP Brief in SPC at 2, DAQ MJP Brief in IPSC at 2.
[26] IPSC MJP Brief at 5, PacifiCorp MJP Brief at 2.
[27] Harken S.W. Corp. v. Bd. of Oil, Gas & Mining, 920 P.2d 1176, 1180-83 (Utah 1996) (describing the expert testimony the Board of Oil, Gas & Mining heard in that case before rendering its decisions).
[28] Zoumadakis v. Uintah Basin Medical Center, Inc., 2005 UT App 325, ¶ 6 n.4, 122 P.3d 891.

consider the motions for judgment on the pleadings, the arguments by IPSC and PacifiCorp regarding "burden of proof" are flatly wrong for purposes of these motions.

Furthermore, on the ultimate underlying question of the adequacy of DAQ's evaluation of IGCC as BACT on the merits, it is the applicants – IPSC and SPC – that bear the burden of proof.[29] Federal courts and the U.S. Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) have repeatedly confirmed that the BACT "top-down approach places the burden of proof on the applicant to justify why the proposed source is unable to apply the best technology available,"[30] and that "permit applicants must apply the most stringent control alternative, unless the applicant can demonstrate that the alternative is not technically or economically achievable.").[31] Thus, on the merits of Sierra Club's claims, the applicants IPSC and SPC must show that they demonstrated to DAQ the infeasibility or non-achievability of IGCC as the best available control technology – and the Board must evaluate whether DAQ's ultimate determination was correct.

In any case, the Board's decision on these motions for judgment on the pleadings is not about Sierra Club's claims on the merits – the Board will decide the merits later in these proceedings, after hearing all the evidence in these cases. Instead, the standard applicable to these motions for judgment on the pleadings requires that the Board accept

[29] Although IPSC has alluded to the adequacy of the IGCC "analysis" it submitted to DAQ, IPSC MJP Brief at 12, the question of the adequacy of that analysis is not before the Board on these motions for judgment on the pleadings. Sierra Club has adequately pled that DAQ's review of that IPSC submission was inadequate and improper. See Exhibit 1, AR IPSC 4495.

[30] Citizens for Clean Air v. EPA, 959 F.2d 839, 845 (9th Cir. 1992) (emphasis added); In re Pennsauken County, New Jersey Resource Recovery Facility, PSD Appeal No. 88-8 (EAB Nov. 10, 1988) (same holding).

[31] In re Inter-Power of New York, Inc., 5 E.A.D. 130, 135 (EAB 1994) (emphasis added).

everything Sierra Club has alleged as true – and, under this standard, any issue of burden of proof which might be applicable at after the Board has heard all the testimony on the merits evidently does not apply at this early stage in the proceedings.

C. The Board May Properly Consider Facts and Legal Arguments that Have Arisen Since the DAQ Decision.

IPSC alone makes the argument[32] that the Board should not consider legal arguments based on facts that have arisen since the DAQ made its decision to issue the Approval Order (AO). This argument is incorrect. Indeed, IPSC directly contradicts its own argument by offering the Board several citations in its brief to facts that occurred as late as November 29, 2006.

First, IPSC expressly contradicts its own argument by citing to at least four factual incidents that occurred after its AO was approved in October 2004. On pages 8-9 of its brief, IPSC cites the November 29, 2006 Supreme Court oral argument by EPA's counsel. On page 9, IPSC cites a February 27, 2006 Federal Register notice. On page 11, in footnote 9, IPSC cites a magazine article from November 2006. On page 14, IPSC cites an EPA letter dated December 13, 2005. IPSC's liberal reliance on post-October 2004 facts and legal developments clearly demonstrates the fallacy of its own argument that the Board should be locked rigidly into considering absolutely nothing that has happened since DAQ approved its AO.

Second, many of Sierra Club's claims rest on the Board's ultimate conclusions as to what the law <u>is</u> – and it is a "long-standing traditional rule" that evolving legal

[32] IPSC MJP Brief at 6-7.

decisions and principles must be applied to cases that are currently pending on appeal.[33] As the Utah Supreme Court has noted, "'[i]t is well established that when a lower court relies on a legal principle which is changed by treaty, statute, or decision prior to direct review, an appellate court must apply the current law rather than the law as it existed at the time the lower court acted.'"[34] The Board stands in the place of an appellate court in these matters: DAQ is an executive agency acting in an administrative capacity, and its legal decisions are not binding or final.[35] The Board, charged with the power to review DAQ decisions, also has the responsibility to determine what the law requires. And, in reviewing these DAQ decisions, the Board has an obligation to consider how the law has developed over the past two-and-a-half years. Sierra Club does agree that, to the extent any of its claims address the adequacy of DAQ's application of any legal principle that was clearly established at the time of DAQ's review, the Board's review is limited to the factual information the agency had before it when it made its decision.

[33] State v. Saunders, 1999 UT 59, ¶ 53, 992 P.2d 951 (holding that a new court decision would be applied both prospectively and retrospectively).
[34] State v. Belgard, 615 P.2d 1274, 1276 (Utah 1980) (quoting United States v. Fitzgerald, 545 F.2d 578 (7th Cir. 1976)).
[35] The Executive Secretary may only act ""as authorized by the board." Utah Code Ann. §19-2-107(2)(g)(2). See also Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 30, 84 P.3d 1134 ("[t]he State Engineer is an executive, not a judicial officer," … and the State Engineer's decisions are not binding on the courts of this state. The State Engineer acts in an administrative capacity") (citations omitted).

II. The Board Must Deny the Motions for Judgment on the Pleadings Because Sierra Club's Requests for Agency Action Sufficiently State Claims on Which Relief Can Be Granted.

A. The Board Must Deny the Motions for Judgment on the Pleadings on Sierra Club's Claims Regarding the Integrated Gasification Combined Cycle (IGCC) Production Process (IPSC RFA # 1, SPC RFA # 2) Because, Taking as True Sierra Club's Factual Allegations, Sierra Club Has Stated a Claim on Which Relief Can Be Granted.

Proponents rely only on characterizations of Sierra Club's pleadings, but have not provided the full text of Sierra Club's claims in their briefs, nor attached the pleadings to their briefs. Sierra Club refers the Board to Exhibit 1, which contains – in full – the sections of Sierra Club's Requests for Agency Action at issue in these motions. In both of Sierra Club's Requests for Agency Action, its claim relating to Integrated Gasification Combined Cycle (IGCC) technology is that "DAQ is required to evaluate this technology comprehensively as part of its BACT analysis."[36] IGCC is significant because it is a proven, currently-available production process for converting coal to energy that also best fulfills the Clean Air Act's overarching goal of reducing pollution emissions.[37] IGCC provides significant reductions in the emission of criteria and hazardous air pollutants compared to the boiler technologies that IPSC and SPC have proposed, provides the opportunity for capturing carbon dioxide and other greenhouse gases, and provides a general increase in efficiency over other technologies.[38] Because of these pollution reduction benefits, DAQ is required to evaluate IGCC as part of its BACT analyses.

Sierra Club has alleged in its Request for Agency Action that IGCC is "an available, demonstrated, clean coal combustion technology with significant emission

[36] Exhibit 1, AR IPSC 4494, SPC RFA p. 4.
[37] Exhibit 2, AR IPSC 2351, AR SPC 2308.
[38] Exhibit 2, AR IPSC 2351, AR SPC 2308.

reduction benefits" that is "technically feasible for the [two projects], and is the top ranked control technology."[39] By express reference, Sierra Club has also alleged that IGCC is a "production process," an "available method" of reducing pollution emissions from plants that convert coal to electricity, and an "innovative fuel combustion technology."[40] Taking these allegations as true, and drawing all inferences in favor of Sierra Club, it is clear that IGCC comes within the definition of BACT, and therefore that Sierra Club has adequately stated a claim. The Board therefore must deny Proponents' motions on this issue.

1. Based on the Facts Alleged in Sierra Club's Requests for Agency Action, IGCC Falls Within the Definition of BACT in the Clean Air Act and the Utah Air Quality Regulations.

The Clean Air Act requires that "no major emitting facility … may be constructed in any area to which this part applies unless … the facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility."[41] The Utah air quality regulations define "best available control technology" as:

> [A]n emission limitation and/or other controls to include design, equipment, work practice, operation standard or combination thereof, based on the maximum degree of reduction of each pollutant subject to regulation under the Clean Air Act and/or Utah Air Conservation Act emitted from or which results from any emitting installation, which the Air Quality Board, on a case-by-case basis taking into account energy, environmental and economic impacts and other costs, determines is achievable for such installation through the application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of each such pollutant.[42]

[39] Exhibit 1, AR IPSC 4494-95, SPC RFA p. 4.
[40] Exhibit 2, AR IPSC 2352, 2354, 2356, AR SPC 2000, 2312-14.
[41] 42 U.S.C. §7475(a)(4).
[42] Utah Admin. Code R307-101-2. The BACT definition has been amended and renumbered as Utah Admin. Code R307-401-2, with the significant change that the

None of the underlined terms in the BACT definition are further defined by Utah law or regulation. The Executive Secretary and the other Proponents emphasize the BACT regulation differently in their briefs. The fact that the parties choose to emphasize different parts of the definition demonstrates clearly the deep factual divide between their positions. However, the applicable legal standards do not allow the Board to determine, at this time, without careful consideration of the relevant facts regarding the IGCC process, which parties' position is ultimately correct. Instead, to decide these motions for judgment on the pleadings, the Board must take the following facts alleged in Sierra Club's pleadings (and the documents incorporated by reference) as true, and disregard any contrary factual statements made in Proponents briefing:

1. IGCC is a method of producing electricity by gasifying the coal, removing pollutants – including greenhouse gases – before combustion, and then burning the "clean" syngas in a modified combined cycle gas-fired power plant. Exhibit 1, AR IPSC 4494, SPC RFA p. 4.
2. IGCC is an available technology for producing electricity from coal. Exhibit 1, AR IPSC 4495), SPC RFA p. 4; Exhibit 2, AR IPSC 1382-83, AR SPC 1245.
3. IGCC is technically feasible for the IPSC and SPC projects. Exhibit 1 at 4495; Exhibit 2, AR SPC 1247.
4. IGCC is the top ranked control technology. Exhibit 1, AR IPSC 4495; Exhibit 2, AR IPSC 1383-85, AR SPC 1247-49.

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former term "installation" has now been replaced with "proposed stationary source." The significance of this change is discussed below in footnotes 49-51 and the accompanying text.

5. IGCC is an available, demonstrated clean coal combustion technology with significant emission reduction benefits. Exhibit 2, AR IPSC 2351, AR SPC 1240.
6. IGCC is a production process that can be used to produce electricity from coal. Exhibit 2, AR IPSC 1381, AR SPC 1244.
7. IGCC is a method for generating electricity from the combustion of coal. Exhibit 2, AR IPSC 1381, AR SPC 1244.
8. IGCC is an innovative fuel combustion technique, and Congress intended that coal gasification be included among the "innovative fuel combustion techniques" considered in BACT analyses. Exhibit 2, AR IPSC 2352; AR SPC 2000, 2309.
9. Requiring consideration of IGCC would not be redefining the source. Exhibit 1, AR IPSC 4495, SPC RFA p. 4.

Applying these facts, taken as true, to the regulatory definition of BACT shows clearly that IGCC comes within the definition of BACT. First, "best available control technology" is an "emissions limitation" that achieves the maximum reduction of each pollutant that is "achievable" by applying "production processes" and "available methods" – which include "fuel cleaning or treatment" as well as "innovative fuel combustion techniques."[43] As alleged in Sierra Club's pleadings, IGCC achieves maximum emission reductions as a "production process" for generating electricity from

[43] 42 U.S.C. §7475(a)(4); Utah Admin. Code R307-101-2. The Executive Secretary's discussion of the BACT rule essentially ignores all of the language in the rule following "through the application of." DAQ MJP Brief in SPC at 11, DAQ MJP Brief in IPSC at 11.

coal;[44] it is an "available method" for generating electricity from coal;[45] it is an "innovative fuel combustion technique," and it is therefore squarely within Utah's definition of "best available control technology."[46] On a plain reading of the BACT rule, IGCC must be considered as part of the BACT analysis. Because IGCC comes within the definition of BACT, DAQ was required to include "emissions limitations" in the IPSC Unit 3 and SPC permits based on the application of IGCC – emissions limitations that would be equivalent to a coal-fired power plant equipped with IGCC technology. Such emissions limitations would result in significant reductions in pollution from the proposed plants.

2. "Best Available Control Technology" is Not Limited to the Technology Proposed by the Applicant.

The Executive Secretary's argument that "the BACT analysis includes control technologies that can be applied to an installation that has already been identified" is incorrect.[47] In effect, the Executive Secretary's proposed interpretation of "installation" would obliterate the BACT analysis, because once an "installation" has been identified in the notice of intent, no changes could be made to it based on the "application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques" that BACT regulation requires.[48] Thus, the Executive Secretary's approach would make meaningless the core requirements of BACT – that achievable emission limitations must reflect the application of production processes, available methods, and systems and techniques for the control of

[44] Exhibit 1, AR IPSC 4494, SPC RFA p. 4; Exhibit 2, AR IPSC 1381, AR SPC 1244.
[45] Exhibit 2, AR IPSC 2351, AR SPC 1240.
[46] Utah Admin. Code R307-101-2.
[47] DAQ MJP Brief in SPC at 11, DAQ MJP Brief in IPSC at 11.
[48] Utah Admin. Code R307-101-2.

pollutants. Indeed, under the Executive Secretary's reading of BACT an applicant could identify a completely antiquated installation in its notice of intent and neither he nor DAQ would have the authority to require the applicant to modernize that identified installation. Thus, the technology-forcing intent of BACT would be totally lost and the provision would cease to achieve maximum reductions in pollutants. Plainly, Utah and federal definitions of BACT clearly contemplate far more than the end-of-the-tailpipe control technologies suggested by the Executive Secretary's argument.[49]

In any case, the Executive Secretary's narrow approach to BACT conflicts with the federal definition of BACT, and therefore must be rejected.[50] In administering a program under the Clean Air Act, DAQ may not adopt a standard that directly conflicts with the federal definitions of the same term, because state implementation plans (SIPs) must be consistent with federal PSD regulations.[51] In no way does the federal regulation suggest that, in applying the BACT analysis, an agency must accept as unalterable a "discrete" installation or an already "identified" installation. Rather, the federal definition, like the Utah definition, gives meaning to maximum pollution reduction by not accepting as a given any particular installation or source, but by requiring the emission limitations that maximize reduction of air pollutants and are achievable by applying

[49] If it were interpreted as the Executive Secretary suggests, the Utah BACT definition would also impermissibly conflict with the federal definitions, because the federal definitions of BACT do not include the term "installation." Instead, the Clean Air Act speaks of emissions from a "major emitting facility," 42 U.S.C. § 7479(3), while EPA regulations speak of "any proposed major stationary source." 40 C.F.R. § 52.21(b)(12).
[50] See footnote 49.
[51] The SIP requirements provide that "[a]ll State plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects" as the federal definitions." 40 C.F.R. §51.166(b) (emphasis added).

production processes, and available methods, systems and techniques, including "innovative fuel combustion techniques."[52] That this is the proper understanding of BACT is further underscored by the discussion below.

3. Because IGCC is a Production Process, an Available Method for Reducing Pollution from Plants Generating Electricity from Coal, and an Innovative Fuel Combustion Technique, it Comes Within the Definition of BACT.

Taking Sierra Club's factual allegations as true for purposes of these motions, as the Board must, Sierra Club has clearly stated a claim that the IGCC production process comes within the definition of BACT, and thus that DAQ had an obligation to consider it as the basis for establishing emission limits on the proposed plants. From the statements in Proponents' briefs,[53] it is evident that they disagree with the factual characterizations of what IGCC is. However, the Board has not yet received any evidence, expert testimony, or description of the IGCC process on which it can base a legal conclusion regarding that process. Because the Executive Secretary and the other Proponents dispute the factual nature of IGCC,[54] the Board must deny their motions for judgment on the pleadings and allow this issue to proceed to discovery and a hearing.

In addition, Proponents' legal arguments regarding IGCC and BACT are incorrect. First, the Utah air quality regulations do not define terms such as "production

[52] In this respect, it is telling that this Board has since changed the definition of BACT to eliminate the term "installation," and instead now refers to emissions "from any proposed stationary source." Utah Admin. Code R307-401-2.

[53] For example, the Executive Secretary has stated that IGCC is not a control technology, DAQ MJP Brief in SPC at 4, DAQ MJP Brief in IPSC at 3; IPSC has stated that IGCC is "unproven," IPSC MJP Brief at 13; and all Proponents have argued that IGCC would constitute "redefining the source." Sierra Club alleges that IGCC is a control technology, that it is an available and demonstrated process, and that consideration of IGCC would not involve redefining the source. See pages 15-16, above.

[54] For example, IPSC argues that IGCC is "unproven under the conditions required for Unit 3." IPSC MJP Brief at 13.

process" or "innovative fuel technology," and there is no guidance in the Utah Air Conservation Act or reported Utah case law that keeps the Board from requiring that DAQ consider IGCC as part of a BACT analysis. Thus the Board, in these adjudications, will ultimately determine the legal meaning of those terms. Second, IGCC is quintessentially the sort of production process meant to be considered in a BACT analysis. EPA has repeatedly acknowledged that the PSD program is technology-forcing and intended to become more stringent over time as control technologies improve and new cleaner processes are introduced. For example, the Environmental Appeals Board has explained that:

> A major goal of the CAA was to create a program that was technology forcing. . . . "The Clean Air Amendments were enacted to 'speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again.'" . . . .
>
> In keeping with this objective, the program Congress established was particularly aggressive in its pursuit of state-of-the-art technology at newly constructed sources. At these sources, pollution control methods could be efficiently and cost-effectively engineered into plants at the time of construction. [55]

Indeed, the legislative history of the 1977 amendment adding the term "innovative fuel combustion techniques" to the Clean Air Act's definition of "BACT" makes clear that BACT includes coal gasification technology such as IGCC. The amendment's sponsor, Senator Huddleston, declared that "[i]t is the purpose of this amendment to leave no doubt that in determining best available control technology, all actions taken by the fuel user are to be taken into account – be they the purchasing or production of fuels

[55] In Re Tenn. Valley Auth., 9 E.A.D. 357, 391 (EAB 2000) (citing Wisc. Elec. Power Co. v. Reilly, 893 F.2d 901, 909 (7th Cir 1990) and H.R. Rep. No. 95-294, at 185, reprinted in 1977 U.S.C.C.A.N. at 1264).

which may have been cleaned or up-graded through chemical treatment, gasification, or liquefaction …."[56] Senator Huddleston expressly noted that "the concept of BACT is intended to include such technologies as low Btu gasification and fluidized bed combustion. But, this intention is not explicitly spelled out, and I am concerned that without clarification, the possibility of misinterpretation would remain. It is the purpose of this amendment [adding the term "innovative fuel combustion techniques"] to leave no doubt that" a coal gasification process like IGCC comes within BACT.[57]

Both the language of the Clean Air Act itself and the unequivocal expressions of congressional intent in the legislative history indicate, that in order to fully comply with the Act, the emission limits identified as BACT must incorporate consideration of more than just add-on emission control technology – they must also reflect appropriate considerations of fuel quality (such as low sulfur coal) and processes capable of reducing emission (including, specifically, innovative combustion techniques such as coal gasification). Indeed, this requirement is not only consistent with, but necessary to the very core objective of PSD permitting – to bring about the rapid adoption of cleaner technologies that provide for a greater reduction in regulated emissions.[58]

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[56] Arnold & Porter, 123 Cong. Record S9421, Clean Air Act Amendments of 1977 (June 10, 1977) (Statement of Sen. Huddleston) (emphasis added).
[57] Id. (emphasis added).
[58] Emission controls under the CAA are universally recognized as including process changes (including inherently cleaner processes) as well as add-on control technology. The PSD provisions expressly recognize this in the definition of BACT included in section 169 of the Act, 42 U.S.C. § 7479. Other sections of the Act reinforce the fact that Congress generally understood and accepted that emission control is often most effectively achieved through process changes. See 42 U.S.C.§ 7412(d)(2) (identifying mechanisms for reducing emission of hazardous air pollutants as including, in addition to add-on controls, "process changes, substitutions of materials or other modifications," as well as "design, equipment, work practice, or operational standards").

4. IGCC is Widely Accepted as a Component of a Proper BACT Analysis.

In recent PSD permitting actions implementing the federal PSD permitting program (either through a direct delegation from EPA or via approval of equivalent state rules in a state implementation plan (SIP)), several states have required consideration of IGCC in the BACT review process for new power plants which generate electricity from coal. These state decisions implementing the federal PSD program validate the plain language of the definition of BACT described above. It is important to note that, while some of these states were operating under SIP-approved PSD programs, the definition of BACT that applied in all cases is virtually identical to the federal definition of BACT with respect to consideration of inherently lower emitting processes. It is noteworthy that these states determined it was entirely appropriate to require consideration of IGCC in the BACT review for a coal- fired power plant.

- In March 2003, the State of Illinois required the applicant for a proposed CFB coal-fired electric generation facility to conduct a robust analysis of IGCC as a core element of its BACT analysis.[59] In an ensuing letter, the State of Illinois then formally informed EPA that Illinois has "concluded that it is appropriate for applicants for [proposed coal- fired power plants] to consider IGCC as part of their BACT demonstrations."[60]

- In December 2002, the State of New Mexico issued a letter requiring a permit applicant for a new coal- fired power plant to conduct a site-specific analysis of IGCC as part of the BACT analysis for the proposed facility.[61] In its evaluation of the applicant's response, New Mexico found that the applicant's BACT analysis had in fact indicated that IGCC is commercially available but that the

[59] Exhibit 2, AR IPSC 2355, 2840, AR SPC 2199, 2312 (Letter from Illinois Division of Air Pollution Control to Jim Schneider, Indeck-Elwood, LLC (March 8, 2003)).
[60] Exhibit 2, AR IPSC 2355, AR SPC 2312 (Letter from Illinois EPA Director to EPA Regional Administrator, Region V (March 19, 2003)).
[61] Exhibit 2, AR IPSC 2355, AR SPC 2313 (Letter from New Mexico Environment Department to Larry Messinger, Mustang Energy Corporation (Dec. 23, 2002)).

applicant had improperly relied on cost to find that the technology was infeasible.[62]

- In addition, the Montana Board of Environmental Review found that the Montana Department of Environmental Quality must consider IGCC as an available technology in the BACT review for a coal-fired power plant, stating ". . . the Department should require applicants to consider innovative fuel combustion techniques in their BACT analysis and the Department should evaluate such techniques in its BACT determination in accordance with the top-down five-step method."[63]

Illinois and Montana are notable because they are the very states which found IGCC to be both a "production process" and an "innovative fuel combustion technique" for achieving greater reductions in pollution emission at a coal-fired generating facility, and therefore, as a matter of law, to be required as part of a BACT analysis.[64]

5. Requiring IGCC as Part of a BACT Analysis Does Not Involve Redefining the Source and Does Not Conflict With Utah's Restriction on Regulating More Stringently Than the Federal Government.

Although Proponents offer a description of EPA guidance on the question, they do not cite any Utah or federal law or regulation that includes the term "redefining the source." However, the plain language of the BACT regulation includes terms such as "production process" and "innovative fuel combustion technology" that describe what IGCC is. Whether IGCC truly is "redefining the source" cannot be decided simply by reviewing Sierra Club's pleadings, when the Board must take as true Sierra Club's factual allegations that IGCC is a production process, available method, and innovating fuel combustion technology. Rather, the Board will have to consider relevant facts – how

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[62] Exhibit 2, AR IPSC 2356, AR SPC 2314 (Letter from New Mexico Environment Department to Larry Messinger, Mustang Energy Company (Aug. 29, 2003)).
[63] Exhibit 2, AR IPSC 2356, AR SPC 2000 (Montana Board of Environmental Review, Findings of Fact, Conclusions of Law, and Order In the Matter of the Air Quality Permit for the Roundup Power Project (Permit No, 3182-00), Case No. 2003-04 AQ (June 23, 2003)).
[64] See Exhibit 2, AR IPSC 2355-56, AR SPC 2000, 2312.

IGCC operates, how it can be integrated into the facility that produces electricity from coal, whether it is available and achievable for these two proposed facilities – in deciding whether requiring emissions limitations based on IGCC as BACT are necessary for the two permits. No factual information, except that alleged in Sierra Club's pleadings, is before the Board at this time.

Moreover, consideration of IGCC technology does not "redefine the source" in a manner that permits the agency to exclude analysis of IGCC from its BACT analysis. Such categorical dismissal of any obligation by DAQ to consider or evaluate the availability, applicability, effectiveness, collateral environmental benefits, or cost effectiveness of a recognized process option for further reducing emission from a power plant producing electricity from coal is flatly contrary to the agency's responsibilities under the PSD program. This argument is inconsistent with the Clean Air Act, the EPA Environmental Appeals Board's (EAB) treatment of the concept of "redefining the source," and decisions by earlier EPA Administrators.

First, as discussed above, Utah's BACT definition, like its federal counterpart, specifically calls for establishing emission limitations based on "the application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each pollutant."[65] This language, on its face, requires as a part of the BACT analysis the consideration of innovative technologies like IGCC that make the generation of electricity from coal significantly cleaner.[66]

[65] Utah Admin. Code R307-101-2 (emphasis added).
[66] As discussed above at pages 20-21, the legislative history of the CAA is equally as clear that the definition of BACT contemplates consideration of technologies like IGCC.

In the Prairie State decision,[67] EPA's Environmental Appeals Board strongly indicated that IGCC is a control technology that must be considered in the BACT analysis. The EAB specifically assumed that even though "selection of IGCC would have required extensive design changes to the [power plant's] proposed Facility," the permitting agency correctly included IGCC in the facility's BACT analysis, despite the permit-applicant's objection that doing so would violate EPA's "policy against redefining the design of the source through application of BACT."[68] Thus, in light of the EAB's decision, improving pollution control by basing emission limitations on the IGCC production process does not constitute "redefining the source."[69]

EAB's endorsement of IGCC in Prairie State is consistent with EPA's position in its New Source Review Workshop Manual that a permitting authority must consider all inherently lower-emitting processes in its BACT analysis, and that "[l]ower-polluting processes should be considered based on the demonstrations made on the basis of manufacturing identical or similar products from identical or similar raw materials or fuels."[70] IGCC is a production process for generating electricity from coal.[71] As such, IGCC involves the identical raw material – coal – and the identical finished product – electricity – as the generation technology proposed by IPSC and SPC. As a result, relevant EPA authority requires that IGCC be considered as part of a BACT analysis.

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[67] In re Prairie State Generating Co., PSD Appeal 05-05, 13 E.A.D. __ (Aug. 24, 2006). Excerpt attached at Exhibit 3.
[68] Id. at 35-36 (see Exhibit 3).
[69] Id.
[70] EPA, New Source Review Workshop Manual, at B-10.
[71] See pages 15-16, above.

Finally, Proponents cite to and attach a letter from EPA, dated December 13, 2005 (the "Page Letter").[72] IPSC correctly concedes, as it must, that this letter no longer has any legal or even persuasive value as a statement of EPA's position on IGCC.[73] This is because, on October 16, 2006, EPA gave notice of a settlement in which EPA expressly agreed that "the December 13, 2005 document is not final agency action and creates no rights, duties, obligations, nor any other legally binding effects on EPA, the states, tribes, any regulated entity or any person."[74] Instead, EPA's EAB decision in Prairie State, endorsing the consideration of IGCC in a BACT analysis, is the most current, and only legally significant EPA statement on IGCC.

Finally, because EPA's most recent pronouncement, through its EAB, approves of the consideration of IGCC in BACT analyses, and there is nothing in federal regulations (or even in federal guidance in the New Source Review Workshop Manual) that expressly precludes the consideration of IGCC, there can be no argument that the Board's requiring consideration of IGCC under the Utah BACT regulation would be a more stringent "rule" than exists in federal regulations.[75]

6. The Board May Properly Determine the IGCC Must be Included in BACT Analyses by Adjudicating these Requests for Agency Action, Because a Decision that DAQ Must Consider IGCC Does Not Have to be Subject to Rulemaking.

Under the Utah Air Conservation Act, the Board has the power to "hold hearings relating to any aspect of or matter in the administration of this chapter" and "issue orders

[72] See, e.g., IPSC MJP Brief at 14.
[73] See id.
[74] Exhibit 4 (Settlement Agreement); see Proposed Settlement Agreement, Clean Air Act Citizen Suit, 71 Fed. Reg. 61,771, 61,771.
[75] Utah Code Ann. § 19-2-106(2).

necessary to enforce the provisions of this chapter."[76] As PacifiCorp concedes, this power includes the power to establish rules of law by adjudication.[77] In deciding what is, or is not, BACT, the language of the BACT regulation requires that the Board decide this question for each of these facilities through adjudication. The Utah air quality regulations provide that the Board must determine what BACT is "on a case-by-case basis."[78]

Proponents' suggestion that every undefined term in every air quality regulation must be subject to rulemaking before it can be applied would turn the administrative appeal process on its head – indeed, it would make the entire section of the air quality regulations regarding "administrative procedures" irrelevant. The federal government, responsible for supervising nationwide Clean Air Act standards, has not found it necessary to address whether IGCC is BACT through a rulemaking. Instead, as illustrated by the Prairie State case and other adjudications cited above,[79] the EPA and the states have addressed whether IGCC is BACT through the adjudication of individual permit applications. Notably, Proponents cite (without providing context) a law review article and a treatise, rather than any Utah or federal statute, regulation, or case law, in support of their proposition. In short, Proponents offer no persuasive legal basis why this Board should not do the same as others regulatory agencies in the country and determine,

[76] Utah Code Ann. § 19-2-104(3)(a)-(b) (emphasis added).
[77] PacifiCorp MJP Brief at 10 (citing Salt Lake Citizen's Congress v. Mountain States Tel. & Tel. Co, 846 P.2d 1245, 1252 (Utah 1992) (holding that "an agency must have the power to establish rules of law on a case-by-case basis within the context of its statutory authority" and that "[r]ules of law developed in the context of agency adjudication are as binding as those promulgated by agency rule making.").
[78] Utah Admin. Code R307-101-2.
[79] See pages 22-23, 25, above.

on the basis of full evidentiary hearings in these adjudications, whether and how IGCC must be considered in a BACT analysis.

7. On a Motion for Judgment on the Pleadings, the Executive Secretary's Statement of Facts is Irrelevant.

As described above, the Board must take Sierra Club's factual allegations as true in deciding these motions. Nevertheless, the Executive Secretary submitted statements of facts in his briefs. These statements are irrelevant, because the Board must accept Sierra Club's factual allegations as true.

Sierra Club notes that the Executive Secretary has not cited to any supporting documents for the statements of fact in its two briefs.[80] This alone is a basis for the Board to reject those statements. Rule 7(c)(3)(A) requires that "each fact shall be separately stated and numbered and supported by citation to relevant materials."[81] Failure to comply with this Rule is sufficient for the Board to reject the Executive Secretary's statements.[82] However, where those statements conflict with the facts alleged in Sierra Club's pleadings, those statements become, by definition, "disputed" issues of fact, which cannot be decide on a motion for judgment on the pleadings. And, because disputed issues of fact exist, the Board must deny those motions.

In addition, Sierra Club disputes the following statements in the Executive Secretary's statements of fact:

5. (same in both of the Executive Secretary's briefs):[83] "Integrated Gasification Combined Cycle (IGCC) is a method of producing electricity for gasifying coal,

[80] DAQ MJP Brief in SPC at 3-4, DAQ MJP Brief in IPSC at 3-4.
[81] Utah R. Civ. P. 7(c)(3)(A) (emphasis added).
[82] Bluffdale City v. Smith, 2007 UT App. 25, ¶¶ 6-12, 570 Utah Adv. Rep. 64.
[83] DAQ MJP Brief in SPC at 4, DAQ MJP Brief in IPSC at 3.

removing pollutants before combustion, and then burning the syngas in a modified combined cycle gas-fired power plant. IGCC is not a control technology but rather a separate process from the proposed CFB technology."

The Sierra Club disputes the second sentence of this statement because it is both unsupported by any citation and because it is factually untrue, for purposes of deciding these motions. As stated above, the Board must accept as true the allegation that IGCC is a control technology as described in Utah's definition of "best available control technology."[84] IGCC is also a "production process" and an "available method" for generating electricity from coal within the definition of BACT, as well as an "innovative fuel combustion technology."[85] The Executive Secretary's statement to the contrary has no support and no legal significance at this point in the proceedings.

Accordingly, the factual statements and arguments Proponents make in their briefs describing what IGCC "is" are irrelevant to their motion for judgment on the pleadings.[86] In deciding these motions these motions, the Board must accept as true Sierra Club's allegations in its RFAs and the incorporated comments that "IGCC is a control technology"[87] – and also that IGCC is a "production process," an "available method" for reducing pollution, and an "innovative fuel combustion technology" within the definition of "best available control technology."

Ultimately, after the parties have had a full opportunity to discover, prepare, and present evidence at a hearing, the Board will have to determine a variety of disputed

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[84] Golding, 793 P.2d at 898 ("in considering the factual allegations in the complaint, we take them as true and consider them and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff."); see page 15, above.
[85] See pages 15-16, above.
[86] See, e.g., IPSC MJP Brief at 13 (describing IPSC as "unproven").
[87] See pages 15-16, above.

issues: whether IGCC is a "control technology" within the meaning of Utah's "best available control technology" regulation, whether it is a "production process," "available method," and an "innovative fuel combustion technology." Sierra Club will present expert testimony and evidence that IGCC fits each of these definitions and therefore that it comes within Utah's definition of "best available control technology." At best, Proponents have flagged issues that cannot be resolved without the Board's consideration of all the relevant facts – they have not carried their burden to show that there are no undisputed facts based on the pleadings. At this stage of these proceedings, when the Board must accept Sierra Club's factual allegations as true, the Board must deny Proponents' motions because IGCC comes within the definition of BACT, and Sierra Club has adequately stated a claim on which relief can be granted.

B. The Board Must Deny the Motions for Judgment on the Pleadings on Sierra Club's Claims Regarding Carbon Dioxide and Other Greenhouse Gas Emissions (IPSC RFA # 3, SPC RFA # 1) Because, Taking as True Sierra Club's Factual Allegations, the Sierra Club Has Stated a Claim on Which Relief can be Granted.

As with its claims regarding IGCC, Sierra Club has adequately pled its claims that DAQ was required to consider carbon dioxide, nitrous oxide, and other greenhouse gas emissions in drafting the permits for IPSC Unit 3 and the proposed SPC power plant. On these preliminary motions for judgment on the pleadings, as described above,[88] the Board must take Sierra Club's allegations as true, and draw all inferences in favor of Sierra Club. Under this standard, Sierra Club has adequately pled its claims regarding DAQ's obligations to address greenhouse gases, and the Board should deny Proponents' motions.

[88] At pages 5-9.

1. The Executive Secretary and the Other Proponents' Motions for Judgment on the Pleadings on Sierra Club's Claims Regarding Carbon Dioxide, Nitrous Oxide and Other Greenhouse Gases Are Based on Misperceptions of Those Claims.

Without providing the Board with a copy of Sierra Club's pleadings, the Executive Secretary argues that "Sierra Club makes the single factual allegation that the Executive Secretary did not require regulation of greenhouse gases."[89] The Executive Secretary is wrong. As illustrated by the actual Requests for Agency Action in Exhibit 1 and excerpts from the incorporated comments in Exhibit 2, AR IPSC 2371-72, 2542-50, AR SPC 2307-08, what Sierra Club has alleged is that carbon dioxide, nitrous oxide, and other greenhouse gases are "air pollutants" that the relevant law requires DAQ to consider in several ways in developing an air quality permit.

As Sierra Club alleged in its Requests for Agency Action, DAQ is obligated to consider carbon dioxide, nitrous oxide, and other greenhouse gas emissions both as a regulated pollutant and as part of the collateral environmental impact in the BACT analysis, during which the agency "is required to consider environmental impacts, such as greenhouse gas emissions, when determining BACT for a facility."[90] Sierra Club alleged that DAQ did not adequately consider how carbon dioxide affects the environment, and failed to consider – as part of its BACT analyses – whether alternative processes (including IGCC) could more effectively control the harmful effects of carbon dioxide and other greenhouse gases.[91]

As described above, in deciding these motions for judgment on the pleadings, the Board must take the following facts alleged in Sierra Club's pleadings (and the

[89] DAQ MJP Brief in SPC at 7, DAQ MJP Brief in IPSC at 6.
[90] Exhibit 1, IPSC 4497, SPC RFA p. 4.
[91] Exhibit 1, IPSC 4496-97, SPC RFA pp. 3-4; Exhibit 2, IPSC 2351, SPC 2308.

documents incorporated by reference) as true, and disregard any contrary factual statements made in Proponents' briefing:

1. Carbon dioxide is an air pollutant. Exhibit 2, AR IPSC 1381, 2351, 2370-71, 2546, AR SPC 2307-08.
2. Nitrous oxide is an air pollutant. Exhibit 2, AR SPC 2307-08.
3. Carbon dioxide emissions are extremely harmful, and are generally recognized by Utah and the United States to be a cause of climate change. Exhibit 2, AR IPSC 2547-48, AR SPC 2307-08.
4. The choice of production process can substantially affect emissions of National Ambient Air Quality Standards pollutants, toxics, and carbon dioxide. Exhibit 2, AR IPSC 2546, AR SPC 2308.
5. IGCC is a commercially available production technology for coal-fired power plants that has lower emissions rates and the ability to separate carbon dioxide emissions for sequestration. Exhibit 2, AR IPSC 2546, AR SPC 2308.
6. IGCC would reduce the emissions of carbon dioxide from IPSC Unit 3. Exhibit 2, IPSC 1384, 2351.
7. IGCC would reduce the emissions of carbon dioxide and nitrous oxide from the SPC facility. Exhibit 2, SPC 2308.

2. DAQ Is Required to Regulate Directly Carbon Dioxide as Part of its Administration of the Clean Air Act Program Approved by EPA.

The U.S. Supreme Court is currently considering a suit initiated by twelve states, fourteen conservation groups, and two cities asserting that EPA is required, under the

Clean Air Act, to regulate carbon dioxide and other greenhouse gas pollutants.[92] The Supreme Court will issue its ruling this spring, and the Board should anticipate the possibility of a decision requiring future regulation of greenhouse gas pollutants from coal-fired power plants.

EPA, and states for which EPA has approved a SIP to administer the Clean Air Act, are required to regulate CO_2 and other greenhouse gases as pollutants under the Clean Air Act. Carbon dioxide, nitrous oxide and other pollutants are squarely within the Act's definition of "air pollutant." The Clean Air Act defines "air pollutant" expansively to include "any physical, chemical, biological, radioactive … substance or matter which is emitted or otherwise enters the ambient air."[93] Further, the Clean Air Act specifically includes carbon dioxide in a list of "air pollutants." Section 103(g) directs EPA to conduct a research program concerning "[i]mprovements in nonregulatory strategies and technologies for preventing or reducing multiple air pollutants, including … carbon dioxide, from stationary sources, including fossil fuel power plants."[94] The Clean Air Act requires regulation of air pollutants that "may reasonably be anticipated to endanger human health or welfare."[95] The statutory definition of "welfare" specifically includes effects on climate and weather.[96]

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[92] Massachusetts v. EPA, U.S. Supreme Court Docket No. 05-1120 (cert. granted June 26, 2006). This subsection of the memorandum summarizes legal arguments before that Court and explains why an affirmative ruling from the Supreme Court would affect Utah PSD permits.
[93] 42 U.S.C. § 7602(g) (CAA §302(g)).
[94] 42 U.S.C. § 7403(g)(1) (CAA § 103(g)(1)).
[95] 42 U.S.C. § 7411 (CAA § 111) (establishing "New Source Performance Standards"); 42 U.S.C. § 7521 (CAA § 202) (establishing emission standards from new vehicles).
[96] 42 U.S.C. § 7602 (CAA § 302(h)).

For purposes of these motions for judgment on the pleadings, the Board must take as true Sierra Club's allegation that carbon dioxide is an "air pollutant." Under the plain language of the Clean Air Act, EPA – and the Utah DAQ administering a SIP-approved program – have a legal obligation to regulate CO_2 and other greenhouse gases as pollutants. If the U.S. Supreme Court agrees that greenhouse gases, such as carbon dioxide, must be regulated under the Clean Air Act, such a decision could also require the establishment of carbon dioxide emission limits in this permit for IPP Unit 3 and the proposed SPC plant.

Similarly, Utah state law also supports regulation of greenhouses gases under the minimum federal requirements and state law. The purpose of the Utah Air Conservation Act is to "provide for a coordinated statewide program for air pollution prevention, abatement, and control."[97] The term air pollution "means the presence in the ambient air of one or more air contaminants in such quantities and duration and under conditions and circumstances, as is or tends to be injurious to human health or welfare, animal or plant life, or property, or would unreasonable interfere with the enjoyment of life or use of property as determined by the standards, rules, and regulations adopted by the Air Quality Board (Section 19-2-104)."[98] DAQ has recognized that "the consensus of most scientists worldwide is that increasing concentrations of greenhouse gases will lead to significant climate warming, shifts in precipitation patterns, and rising sea levels, although the magnitude, timing, and regional patterns of these changes cannot be

[97] Utah Code Ann. § 19-2-101(4)(a).
[98] Utah Code Ann. § 19-2-102; Utah Admin. Code R307-101-2.

accurately predicted at this time."[99] Accordingly, because carbon dioxide, nitrous oxide and other greenhouse gases are "air pollutants," existing federal and state legal authority required DAQ to consider greenhouse gas emissions in developing these permits.

3. DAQ Is Required to Consider Carbon in the BACT Collateral Impacts Analysis.

In any case, DAQ's obligation to consider carbon dioxide, nitrous oxide, and other greenhouse gases extends to the BACT analysis. The BACT requirement applies to "each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility."[100] However, even if carbon dioxide is not treated as a regulated pollutant, Sierra Club has adequately alleged in its pleadings that DAQ must still consider carbon dioxide as a non-regulated pollutant in the collateral impacts stage of the BACT analysis.

As Sierra Club has adequately alleged, at the minimum, DAQ must consider emissions of carbon dioxide in its BACT analysis for IPP Unit 3. The federal EAB has interpreted the definition of BACT as requiring consideration of unregulated pollutants in setting emission limits and other terms of a permit, since a BACT determination is to take into account environmental impacts.[101] The Utah BACT regulation expressly requires that the Board determine the best available control technology "on a case-by-case basis taking into account energy, environmental and economic impacts and other costs."[102] In addition, Sierra Club has also incorporated by reference in its pleadings a paper by then-EPA Assistant General Counsel Gregory B. Foote indicating that it is entirely appropriate

[99] Utah Division of Air Quality, Greenhouse Gas Inventory-1990 and 1993, available at www.airquality.utah.gov/PLANNING/Grnhsgas.htm.
[100] 42 USC § 7475(a)(4) (CAA § 165(a)(4)).
[101] See In Re North County Resource Recovery Associates, 2 E.A.D. 229, 230 (Adm'r 1986), 1986 EPA App. LEXIS 14.
[102] Utah Admin. Code R307-101-2.

for agencies to consider carbon dioxide emissions when evaluating environmental impacts under the new source review permit program.[103]

The essence of the BACT analysis is comparing various pollution control technologies, including their differential collateral environmental impacts to derive emission limitations or other controls. DAQ did not address carbon dioxide or other greenhouse gases to be emitted from the two proposed plants in its BACT analysis. However, such emissions can be quite significant from coal-fired boilers. The selected technologies in the BACT analyses, a circulating fluid bed boiler for SPC and a subcritical (and later a supercritical) boiler for IPSC, will have greater environmental impacts from higher carbon emissions than would the IGCC process. Yet, the IPSC and SPC AOs fail to consider this critically important collateral impact.

Sierra Club has adequately alleged that DAQ had an obligation to consider carbon dioxide, nitrous oxide, and other greenhouse gas emissions in developing the permits for the proposed IPSC and SPC facilities. Taking as true the allegations that carbon dioxide and other greenhouse gases are "air pollutants" and that technology – IGCC – exists that would reduce the emissions from the proposed plants, Sierra Club has stated a claim that DAQ was required to consider these pollutants in the IPSC Unit 3 and SPC permits. As a result, the Board should deny the motions for judgment on the pleadings regarding these claims.

[103] Exhibit 2, IPSC 2542-49, SPC 1282 (Gregory B. Foote, Considering Alternatives: The Case for Limiting CO2 Emissions from New Power Plants through New Source Review (discussing the regulatory background to support consideration of CO2 impacts when permitting a new source and, in particular, a new coal-fired power plant)).

C. The Board Must Deny the Motions for Judgment on the Pleadings on Sierra Club's Claim Regarding Coal Chemistry Data (IPSC RFA # 5) Because, Taking as True Sierra Club's Factual Allegations, Sierra Club Has Stated a Claim on Which Relief Can Be Granted.

The Board must deny IPSC's motion for judgment on the pleadings regarding Sierra Club's fifth claim in its IPSC Request for Agency Action for the sole reason that, even though IPSC references materials outside the pleadings, IPSC has not carried its burden of showing that there are no issues of material fact remaining regarding that claim. Instead, taking as true the allegations in Sierra Club's pleadings, it is clear that Sierra Club has adequately stated a claim on this issue. The Board must apply the proper standard for reviewing a motion for judgment on the pleadings and deny IPSC's invitation to prematurely decide this issue on the merits.

Sierra Club's fifth claim asserts, in full:

> IPSC's permit application did not contain precise coal chemistry data due to the fact that the corporation had not identified the actual coal to be burned at IPP Unit 3. The failure to include coal chemistry data prevents an accurate determination of percent removal efficiency limits, short term emission rates, and total mass emissions of pollutants such as mercury. Moreover, the description of the coal type and coal quality in the permit application is often vague and conflicting. Thus, reliance on such information by UDAQ is arbitrary and capricious. In the event IPSC plans to blend coal, the final permit should contain a coal quality/coal blending requirement. UDAQ wrongfully deleted such a provision from an earlier draft of the permit.
>
> In summary, the permit application was fatally flawed by failing to include coal quality and/or coal blending information. The application also contained internally inconsistent information on coal quality. UDAQ erroneously issued a final permit without adequate coal quality data. For these reasons, the AO is illegal and should be rescinded and/or remanded to the agency.[104]

Notwithstanding the characterization in IPSC's brief, Sierra Club's claim is that DAQ set emissions limits without adequate coal data, that the inadequacy of the data

[104] Exhibit 1, AR IPSC 4498 (emphasis added).

results from vague and conflicting information in the submissions, and that the result of this inadequate data is a permit that contains improper emission rates and limits.

For purposes of evaluating whether Sierra Club has stated a claim, on the motion for judgment on the pleadings, the Board must take as true the following facts alleged in Sierra Club's pleadings:

1. IPSC did not include precise coal chemistry data with its application. Exhibit 1, AR IPSC 4498.
2. Coal chemistry, its chlorine content specifically, is important because it affects the ability of existing control equipment to remove mercury from exhaust streams. Exhibit 2, AR IPSC 2477.
3. Accurate coal chemistry data is required to ensure an accurate determination of percent removal efficiency limits, short term emission rates, and total mass emissions of pollutants such as mercury. Exhibit 1, AR IPSC 4498.
4. IPSC's application did not contain coal quality information or coal blending information to ensure all emissions limitations will be met. Exhibit 1, AR IPSC 4498; Exhibit 2, AR IPSC 2350.
5. For some emissions, like mercury, IPSC proposes to look at the range of coals that IPP Unit 3 will be designed to burn over the life of the plant (i.e., bituminous and subbituminous). The range of mercury content of the coal (.02 ppm by weight to.15 ppm) provided by IPP is too broad and vague to be relied upon. Exhibit 2, AR IPSC 2350.

6. The September 8, 2003 Technical Memorandum states that IPSC will burn only Western bituminous coals. This is inconsistent with other statements in the administrative record regarding the type of coal to be burned at Unit 3. Exhibit 2, AR IPSC 2350.
7. An earlier draft of the permit contained a 20% blending limit which was wrongfully eliminated from the final permit. Exhibit 2, AR IPSC 2350.
8. It is essential that an air quality permit contain an enforceable coal quality/blending requirement to ensure that short term emission limits are met as well as other permit conditions. Exhibit 2, AR IPSC 2350.

On this motion for judgment on the pleadings, the only question the Board must answer is whether there is a dispute regarding the adequacy of the coal data submitted. Taking Sierra Club's allegations as true, and contrasting them with the statements IPSC makes in its brief, shows clearly that issues of disputed material fact remain regarding the adequacy of IPSC's coal chemistry data.

The air quality regulations require that an applicant submitting a notice of intent to construct supply information regarding "the type and quantity of fuels employed."[105] However, this requirement does not exist in a vacuum: the federal Clean Air Act, the Utah Air Conservation Act, and DAQ regulations that implement these Acts have as their overriding purpose "air pollution prevention, abatement, and control."[106] The requirements for an application for a new source permit[107] – including information concerning type and quantity of fuel, composition and characteristics of effluent streams,

[105] Utah Admin. Code R307-401-5(2)(a).
[106] Utah Code Ann. § 19-2-101(4)(a).
[107] Utah Admin. Code R307-401-5.

types and concentration of air contaminants, analysis of best available control technology, and "[a]ny other information necessary to determine if the proposed source or modification will be in compliance with Title R307" – exist to ensure that a new permit complies with the pollution prevention, abatement, and control purpose that guides DAQ's mission. Providing incomplete, vague, contradictory, or otherwise inadequate data on the composition and chemistry of the coal an applicant intends to use, as Sierra Club alleges IPSC has done in this case, makes any DAQ decision on permit conditions regarding coal composition arbitrary and capricious.[108]

Sierra Club disputes that IPSC has presented a "worst-case" coal-supply scenario,[109] and alleges that the applicant presented coal chemistry data inadequate to ensure that all emissions limitations will be met. Sierra Club further alleges that IPSC has submitted vague and conflicting coal chemistry data that does not reflect a worst-case scenario. This includes, for example, IPSC's reference to a range of mercury contents for its coal, instead of a single figure at the higher end of that range that would truly represent the worst case. Likewise, IPSC has claimed that it would only burn Western bituminous coal, yet Condition 19 of the final AO allows for burning up to 30% subbituminous coal, which produces higher pollution emissions than bituminous coal. Most significantly, DAQ's draft permit in this matter required a 20% percent blending limit to ensure that emissions limitations would be met.[110] The final permit increased this

[108] An agency action is void under the Utah Administrative Procedures Act if it "is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record." Utah Code Ann. § 63-43b-16(4)(g).
[109] IPSC MJP Brief at 18-19.
[110] Exhibit 2, AR IPSC 2350.

percentage blending limit, and DAQ has not adequately explained the reason it changed this essential requirement for ensuring that pollution emission limitations will be met.[111]

In short, IPSC is asking the Board to rule on the merits of whether its coal chemistry data was inadequate. On a motion for judgment on the pleadings, the Board must accept Sierra Club's allegations as true, and draw all relevant inferences in favor of Sierra Club. Whether or not the IPSC submitted adequate coal chemistry data, whether DAQ's decision to draft the permit based on the inadequate data submitted was arbitrary and capricious, and whether DAQ adequately explained its reversal of direction regarding the percentage blending limit that DAQ removed from the final permit are questions involving underlying disputes of material fact that cannot be resolved on a motion for judgment on the pleadings. The Board accordingly must deny IPSC's motion.

D. The Board Must Exclude Materials Outside of the Pleadings, or, if the Board Chooses to Convert These Motions to Motions For Summary Judgment, the Board Should Continue Decision on These Motions Until Sierra Club has Reasonable Time to Conduct Discovery

It is clear under Utah law that a party which moves for judgment on the pleadings is limited to arguments based on the facts and claims alleged in the pleadings.[112] All of the Proponents except IPSC adhere to this basic principle. Yet all the parties, including IPSC, have chosen to present their motions as for a judgment on the pleadings. Because of Proponents' choices, the Board must apply the standards for such motions and, as

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[111] When an agency alters direction without providing adequate explanation, the agency's decision is void under the Utah Administrative Procedures Act because it is "contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Utah Code Ann. § 63-43b-16(4)(h)(iii).

[112] Colman, 795 P.2d at 624 (the tribunal may "look solely to the material allegations of [the plaintiff's] complaint").

discussed above, the Board must exclude IPSC's exhibits from consideration on these particular motions.[113]

Utah Rule of Civil Procedure 12(c), which governs motions for judgments on the pleadings, does provide that the Board has discretion to consider materials outside the pleadings.[114] However, it may only do so if it coverts the motion to one for summary judgment.[115] In the event the Board decides to do so, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[116] There is no reason to convert Proponents' pending motions to motions for summary judgment: denying Proponents' motions at this preliminary stage based on the pleadings alone does not prevent Proponents from moving for summary judgment after all sides have had an opportunity to take discovery and prepare and present expert testimony on the issues in this matter.[117] The schedules in both matters expressly provide for the filing of post-discovery dispositive motions by August 3, 2007 (in the SPC matter) and September 5, 2007 (in the IPSC matter).

In any event, and for the same reasons described above, a motion for summary judgment on any of these issues must fail. The standard for summary judgment requires a tribunal to ""examine all of the facts presented and the inferences to be drawn

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[113] Id.
[114] Utah Rule of Civil Procedure 12(c) provides: "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."
[115] Utah R. Civ. P. 12(c).
[116] Id.
[117] The fact that none of the Proponents has included a properly supported statement of undisputed facts, as required by Utah R. Civ. P. 7(c)(3)(A) is a further reason the Board should not convert these motions into motions for summary judgment.

therefrom in the light most favorable to the nonmoving party,"[118] and only grant judgment if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'"[119] Sierra Club has sufficiently shown that these claims involve material issues of fact, and that the Board cannot grant Proponents' motions, whether on the pleadings or on summary judgment.

Furthermore, the Board cannot convert these motions to motions for summary judgment without providing a reasonable opportunity for Sierra Club to obtain discovery and to present evidence and affidavit contesting the factual allegations suggested in Proponents' briefs. The conversion process under Rule 12(c) "includes giving the parties reasonable notice and opportunity to submit all pertinent summary judgment materials for the [Board]"s consideration."[120] As the Utah Supreme Court has noted, "if a motion to dismiss is converted to a motion for summary judgment, it must only be done so as to not create procedural prejudice to one of the parties," because the rule "gives the opposing party an opportunity to gather evidence to rebut the movant's evidence. Without such a rule, one party could have the benefit of significant, supporting evidence while the other party would be left to rely solely on the unsubstantiated pleadings."[121] It would also be

[118] Grynberg v. Questar Pipeline Company, 2003 UT 8, ¶ 20, 70 P.3d 1 (quoting Utah R. Civ. P. 56(c)) (emphasis added).
[119] Fennell v. Green, 2003 UT App 291, ¶ 6, 77 P.3d 339.
[120] Tuttle v. Olds, 2007 UT App 10, ¶ 8, 569 Utah Adv. Rep. 10 (noting that "[t]he notice and opportunity to submit requirements are especially important with respect to the party against whom judgment is entered."); see also Strand v. Associated Students of Univ. of Utah, 561 P.2d 191, 193 (Utah 1977) (stating that the opportunity for the non-moving party to submit rule 56 material is particularly important).
[121] Colman, 795 P.2d at 625.

improper to allow the moving party, in this case Proponents, to present evidence in their reply briefs, without affording Sierra Club the opportunity to respond.[122]

Although there is no reason for the Board to convert these motions for judgment on the pleadings into motions for summary judgment, Sierra Club requests that, if the Board decides to treat these motions as motions for summary judgment, that it continue the motions until the August and September deadlines for post-discovery dispositive motions provided in the schedules for these matters. Together with this Consolidated Opposition, Sierra Club has made a formal motion to this effect as provided in Utah Rule of Civil Procedure 56(f).[123] An affidavit in conformance with Rule 56(f) is attached to that motion.[124] The Utah Supreme Court has "held on numerous occasions that rule 56(f) motions opposing a summary judgment motion on the ground that discovery has not been completed should be granted liberally unless they are deemed dilatory or lacking in merit."[125] Because the discovery process has barely started in these matters, and Proponents will have scheduled opportunities to renew their motions as properly-supported motions for summary judgment after discovery is completed, the Board should deny Proponents' motions for judgment on the pleadings without converting them to motions for summary judgment.

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[122] Badger v. Brooklyn Canal Co., 922 P.2d 745, 753 (Utah 1996).
[123] Utah R. Civ. P. 56(f) provides that "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition; the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."
[124] Strand, 561 P.2d at 193-94.
[125] Salt Lake County v. Western Dairymen Coop., Inc., 2002 UT 39,¶ 24, 48 P.3d 910.

Dated: March 19, 2007

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March 2007, I caused a copy of the foregoing Consolidated Opposition to Motions for Judgment on the Pleadings to be emailed to the following:

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